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No. 93-1783

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In the Supreme Court of the United States

OCTOBER TERM, 1994

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In this case, the court of appeals held that the Director of the Office of Workers' Compensation Programs (OWCP) is without standing to petition for review, under Section 21(c) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 921(c), of the decision rendered by the Benefits Review Board (the Board) on an LHWCA claim. The court held that the Director lacks standing unless the Board's decision will affect the Special Fund administered by the Director, 33 U.S.C. 944(a), or will disrupt the Director's specifically designated administrative functions. In our petition, we show that the Director's standing is not so circum-

scribed, and that based on her broad administrative role under the LHWCA, she has standing to challenge a Board decision resolving a benefits controversy. We also show that this issue is one that has divided the courts of appeals and is important to the enforcement of the LHWCA. Respondent Newport News Shipbuilding and Dry Dock Company does not offer a defense of the court of appeals' ruling on the merits of the standing issue, but respondent nevertheless urges the Court to deny review. The reasons it advances, however, are not persuasive.

1. In its May 24, 1994, letter to the Court waiving its right to file a response to the certiorari petition, respondent agreed with our submission that there is a conflict among the circuits on the question presented. Respondent now contends (Br. in Opp. 2, 4), however, that there is not a "true" conflict and that certiorari should be denied. Respondent was correct the first time around.

In the certiorari petition, we demonstrate that while decisions of the Second and Fifth Circuits agree with the approach to the Director's standing taken by the court below (see *Fusco* v. *Perini N. River Assocs.*, 601 F.2d 659 (2d Cir. 1979), vacated and remanded on other grounds, 444 U.S. 1028 (1980), reinstated on remand, 622 F.2d 1111, 1113 (2d Cir. 1980), cert. denied, 449 U.S. 1131 (1981); *Director, OWCP* v. *Donzi Marine, Inc.*, 586 F.2d 377, 382 (5th Cir. 1978)), the District of Columbia Circuit has recognized that the Director's general supervisory and enforcement interests under the LHWCA provide her with standing to challenge Board decisions on LHWCA claims. *Shahady* v. *Atlas Tile & Marble Co.*, 673 F.2d 479, 483 (D.C. Cir. 1982); *Director, OWCP* v. *National Van Lines, Inc.*, 613 F.2d 972, 977 n.6 (D.C. Cir. 1979), cert. denied, 448 U.S. 907 (1980).

Respondent acknowledges (Br. in Opp. 4-5) that the D.C. Circuit decisions upon which the Director relies

state that the Director should be accorded broad standing. The court of appeals in the instant case viewed the D.C. Circuit's position in *Shahady* as conflicting with the position that it adopted. See Pet. App. 12a (court of appeals' prefacing of citation to *Shahady* with "*but see*"). Respondent contends that the conflict is not a "true" conflict because in the D.C. Circuit decision upholding the Director's standing as a petitioner—*National Van Lines*, which was explained in *Shahady*—the claimant was also a petitioner. Br. in Opp. 4. In *National Van Lines*, however, the court's decision to entertain the Director's petition was not premised upon the presence of the claimant as a petitioner in the case. Rather, the court concluded that the Director had standing in her own right, based upon her own interests. 613 F.2d at 977 n.6. As a result, in the D.C. Circuit, "the Director's general supervisory and enforcement interest, apart from any pecuniary interest, is sufficient to confer upon the Director standing to file a petition for review under [S]ection 921(c)." *Shahady*, 673 F.2d at 483. It therefore is clear that the D.C. Circuit would entertain the Director's challenge to the Board's order that the Fourth Circuit refused to entertain in this case.

In addition, respondent ignores the decision of the Third Circuit in *Director, OWCP* v. *Rochester & Pittsburgh Coal Co.*, 678 F.2d 17 (1982), which held that the Director has standing to petition for review under Section 21(c) of the LHWCA, as incorporated by the Black Lung Benefits Act (BLBA), 30 U.S.C. 932(a). See Pet. 12-13. The Third Circuit based its holding on the Director's "responsibility to ensure the proper enforcement and lawful administration of the black lung benefits program," even though the government had not paid any benefits to the claimant during the period in question and the Director therefore lacked a pecuniary interest in

the resolution of the benefit claim. 678 F.2d at 18-19 n.2. Although the claimant also appeared as a respondent before the court of appeals in *Rochester & Pittsburgh*, the Third Circuit analyzed the Director's standing without reference to the claimant's presence, and it concluded that the Director's administrative role provided her with standing to petition for review. See also *Curtis* v. *Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 807 n.4 (3d Cir. 1988) (indicating approval of *Shahady*, although not reaching the issue).

Respondent's view that appellate decisions on this issue can be explained by the presence or absence of the claimant as a party to the appeal is also inconsistent with appellate decisions that have denied the Director standing. For example, in *Director, OWCP* v. *Bethlehem Steel Corp.*, 620 F.2d 60, 63 (5th Cir. 1980), the court of appeals concluded that the Director failed to meet the *Donzi Marine* test for standing and therefore declined to consider his petition, even though the claimant also appeared before that court as a petitioner. *Id.* at 63; see also *Fusco*, 601 F.2d at 670 (court dismissed Director's petition for review, although claimants were also present as petitioners).

In short, courts of appeals have addressed separately the question whether the Director has standing—and have dismissed or entertained the Director's petition for review depending upon their divergent approaches to that question—without regard to whether the claimant was also a party in the court of appeals. The Court left open the question of the Director's standing in *Director, OWCP* v. *Perini N. River Assocs.*, 459 U.S. 297, 302-305 & n.9 (1983), and there is a circuit conflict on that issue.[1]

[1] In *Perini*, the Court declined to decide whether the Director has Article III standing to file a petition for a writ of certiorari

This Court should grant certiorari to resolve that conflict.

2. Respondent asserts (Br. in Opp. 2, 6) that the issue presented in this case is of "very limited importance" and therefore does not warrant review by this Court because the court of appeals' decision "has little material effect on anyone other than the Director." *Id.* at 6. The Director, however, is the officer charged by Congress with enforcement and administration of the Act, and, as we demonstrate in our petition, Congress intended her to have broad authority to protect and advance the public interest in resolution of benefit claims arising under the LHWCA. Pet. 15-19.[2] The nature and scope of the Director's standing is therefore an important question that warrants this Court's review.

Respondent is not on firm ground in suggesting (Br. in Opp. 6-7) that the Director can sufficiently carry out the broad role envisioned by Congress by intervening in cases in which petitions for review are filed by other parties. As this case illustrates, the Director cannot always rely on other parties to challenge Board

because the employer in that case had conceded that the Director was a proper respondent before the court of appeals (and thus was statutorily entitled to file a certiorari petition under 28 U.S.C. 1254(1)), and because the claimant participated before this Court as a respondent and filed briefs in support of the Director. But see *Diamond* v. *Charles*, 476 U.S. 54, 62-63 (1986) (holding intervenor defendant could not appeal from judgment that State declined to appeal). Because the Court reserved the question, respondent is wrong in suggesting (Br. in Opp. 3 n.1) that the Court in *Perini* ruled that "the Director does *not* automatically have standing in each and every Longshore Act case before the courts of appeals."

[2] Respondent also ignores the fact that the issue presented by this case can present itself in cases arising under the Black Lung Benefits Act. See Pet. 17-19.

decisions that she believes warrant judicial review. The Director's "responsibility to oversee the development of a consistent body of law in this area should not depend upon the vagaries of the parties' private, albeit adversary, interests." *Curtis, Inc.*, 849 F.2d at 807 n.4.

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For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

DREW S. DAYS, III
Solicitor General

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